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No. 716

IN THE

Supreme Court of the United States

OCTOBER TERM, 1970

ELLINGSON TIMBER COMPANY, *Petitioner-Plaintiff,*

v.

GREAT NORTHERN RAILWAY COMPANY, a Corporation; and WESTERN PACIFIC RAILROAD COMPANY, a Corporation, *Respondents-Defendants.*

PETITION FOR A WRIT OF CERTIORARI TO THE UNITED STATES COURT OF APPEALS FOR THE NINTH CIRCUIT

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September 18, 1970

PRESS OF BYRON S. ADAMS PRINTING, INC., WASHINGTON, D. C.

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PETITION FOR A WRIT OF CERTIORARI TO THE UNITED STATES COURT OF APPEALS FOR THE NINTH CIRCUIT

OPINIONS BELOW

The opinion and order of June 20, 1968, of the District Court for the District of Oregon has not been officially reported; it is reprinted as Appendix G to this petition. (App. 77a.) The decision of April 21, 1970, of the United States Court of Appeals for the Ninth Circuit is not yet reported; it is reprinted as Appendix H to this petition. (App. 81a.)

JURISDICTION

The judgment of the United States Court of Appeals for the Ninth Circuit was entered on April 21, 1970. (App. 81a.) The jurisdiction of this court is invoked under 28 U.S.C. § 1254(1). On July 7, 1970, Mr. Justice White extended the time for filing this petition to and including August 19, 1970. On August 5, 1970, Mr. Justice Marshall further extended the time for filing this petition to and including September 18, 1970.

QUESTIONS PRESENTED

1. Whether the trial court abused its discretion by preliminarily segregating certain issues for separate trial, which led to summary disposition of a complex antitrust suit on those issues, where plaintiff had been denied from the very outset the benefit of discovery on numerous factual matters inextricably related to both the overall merits of the case and to the segregated issues?

2. Whether a federal district court lacks jurisdiction in an antitrust case charging a conspiracy which achieved its unlawful objectives *partly* through the use of a common carrier rate that had previously been found lawful under the Interstate Commerce Act?

3. Whether the Clayton Act's statute of limitations bars an antitrust suit where maintenance of a joint common carrier rate, an element in the alleged illegal conspiracy, coupled with petitioner's presence in the market as a competitor, constitutes the only known "overt" act continuing into the limitations period?

4. Whether the alleged possession of monopoly power in violation of Section 2 of the Sherman Act within the

four years' preceding suit, coupled with plaintiff's presence as an affected competitor in the market, constitutes sufficient overtness to sustain a cause of action against an asserted Clayton Act statute of limitations defense?

5. Whether the district court deprived petitioner of its constitutional right to a jury trial by segregating jurisdictional and limitations issues for separate trial before the court, where said issues involved disputed questions of fact peculiarly within the province of the jury and where petitioner made a timely demand for a jury trial; and, whether petitioner's failure to reassert its demand therefor, standing alone, constituted a waiver of said right?

STATUTORY PROVISIONS

Section 1 of the Sherman Antitrust Act, 15 U.S.C. § 1 (1964), in pertinent part, provides:

> "Every contract, combination in the form of trust or otherwise, or conspiracy, in restraint of trade or commerce among the several States, or with foreign nations, is declared to be illegal . . . ."

Section 2 of the Sherman Antitrust Act, 15 U.S.C. § 2 (1964), provides:

> "Every person who shall monopolize, or attempt to monopolize, or combine or conspire with any other person or persons, to monopolize any part of the trade or commerce among the several States, or with foreign nations, shall be deemed guilty of a misdemeanor, and, on conviction thereof, shall be punished by fine not exceeding fifty thousand dollars, or by imprisonment not exceeding one year, or by both said punishments, in the discretion of the court."

Section 4 of the Clayton Act, 14 U.S.C. § 15 (1964), provides:

> "Any person who shall be injured in his business or property by reason of anything forbidden in the antitrust laws may sue therefor in any district court of the United States in the district in which the defendant resides or is found or has an agent, without respect to the amount in controversy, and shall recover threefold the damages by him sustained, and the cost of suit, including a reasonable attorney's fee."

Section 4b of the Clayton Act, 15 U.S.C. § 15b (1964), in pertinent part, provides:

> "Any action to enforce any cause of action under sections 15 or 15a of this title shall be forever barred unless commenced within four years after the cause of action accrued."

STATEMENT

The petitioner-plaintiff, Ellingson Timber Company ("Ellingson", "petitioner" or "plaintiff"), is a relatively small company engaged in the acquisition of timber, the manufacture of lumber products, and the sale and distribution of such products in various parts of the country.

The respondent-defendant, Great Northern Railway Company ("GN"), is one of the larger rail carriers in the country, operating an extensive railroad system principally through the north central and the pacific northwest regions of the country.

The other respondent-defendant, Western Pacific Railroad Company ("WP"), operates an extensive railroad system, primarily from Oakland, California, to Salt Lake City, Utah, with numerous connecting

lines and feeders. Additionally, it constitutes an important link in the through route to Chicago, Illinois, and in the center portion of the north-south pacific coast route.

Ellingson's lumber operations pertinent to this petition involved its Big Lakes mill at Klamath Falls, Oregon, located just east of the Cascade Range in southern Oregon near the California state line. Competing mills in Klamath Falls during the relevant period included the Klamath Basin Pine Mills ("KBPM"), which was acquired by GN in 1931 but was leased to and operated by independent companies until 1961, when it was sold to a third party.

Standing timber owned by the United States in the Jellico-Poison Lake area, part of the Lassen Forest in northern California approximately 135 miles southeast of Klamath Falls, is periodically offered for sale at public auction. Ellingson was the successful bidder against KBPM at Jellico in July, 1955, and at Poison Lake in January, 1957. Log shipments therefrom to Klamath Falls commenced on July 9, 1956, and ceased on August 8, 1958. They were made in the only way feasible: by rail—and for such shipments Ellingson was totally dependent on WP for about one-quarter of the distance and on GN for the remaining distance to Klamath Falls.

Ellingson's local competitor, KBPM, shipped logs from Ash Creek, California, to Klamath Falls. Ash Creek is south of Klamath Falls in northern California. It is somewhat closer to Klamath Falls in actual distance than is the Jellico-Poison Lake area. However, the rail shipping route between Ash Creek and Klamath Falls via GN and a third line is somewhat longer.

In 1956, GN and WP established a joint rate from the Jellico and Poison Lake points to Klamath Falls. This rate was higher than the rate for the longer Ash Creek to Klamath Falls run utilized by Ellingson's competitor, KBPM. Also, Ellingson was subject to a "cutback" provision (the only one in which WP or GN had participated) which added approximately 40% to the rate. The so-called "cutback" arrangement provided for a high flat rate for log shipments to the mill. However, if, within 24 months after such shipments, Ellingson shipped its lumber products *eastward* on a GN or WP transcontinental route, it could obtain a 40% noninterest-bearing refund ("cutback"). Ellingson shipped its logs from the Lassen Forest to Klamath Falls in accordance with this rate structure. The effect was to compel Ellingson to discontinue shipping lumber products into various western states, including the lucrative California market.

After completing its log shipments out of Lassen Forest on June 17, 1958, Ellingson filed a complaint with the Interstate Commerce Commission on June 26, 1958, charging that the GN-WP rates from the Jellico-Poison Lake area to Klamath Falls were unreasonable and discriminatory. Plaintiff sought a reduced, nondiscriminatory future rate and reparations for past injury based principally upon the excessive portion of the rates and interest on the "cutback" amounts held by the carriers.

The Interstate Commerce Commission rendered its final decision on April 29, 1960. *Ellingson Timber Co.* v. *Great Northern Ry.*, 310 I.C.C. 249 (1960). After considering, among other things, the rates applicable to KBPM on the Ash Creek to Klamath Falls route, it held that the rates charged Ellingson were

not excessive or discriminatory. However, it struck down the "cutback" provision to the extent it limited refunds to situations where the lumber products were shipped eastward on the GN or WP. In other words, the Commission required that "cutbacks" be equally refundable when these carriers were used for shipments elsewhere, including the lucrative California market. As a practical matter, however, this holding had no remedial economic value to Ellingson since the refund depended on the presence of a "through" rate as well, and there was, for example, no such rate applicable to the California route. Ellingson did not appeal the Commission's decision.

The joint rate in question has remained in effect up to the present time and has precluded petitioner from competing for the purchase of Lassen Forest timber (which has since been submitted for bids) and from competing in the California market for lumber products. Furthermore, in July of 1963 petitioner was compelled by these circumstances to liquidate most of its mill facilities in Klamath Falls.

On June 8, 1967, following the unfolding of subsequent events and the discovery of theretofore unknown facts, petitioner filed a private antitrust suit against respondents in the United States District Court for the District of Oregon. The complaint alleged that respondents engaged in conduct which violated Sections 1 and 2 of the Sherman Act and which, as a consequence, resulted in petitioner sustaining substantial damage to its business operations.

Other facts pertinent to this petition are disclosed in the discussion that follows.

REASONS FOR GRANTING THE WRIT

This Court has enumerated several reasons which *may* move it to exercise its sound judicial discretion to review a matter on writ of certiorari. One such reason is where a court of appeals

> . . . has so far departed from the accepted and usual course of judicial proceedings, or so far sanctioned such a departure by a lower court, as to call for an exercise of this court's power of supervision.[1]

The district court in this case made certain critical rulings, affirmed by the court of appeals, which clearly call for the exercise of this Court's supervisory powers. The trial court flagrantly abused its discretion by prematurely and improperly segregating two affirmative defenses for separate trial, which led to summary disposition of a complex antitrust suit, without according petitioner the benefit of discovery on numerous factual matters inextricably related to both the allegations in the complaint and said defenses.

The district court also arrogated to itself the role of factfinder with respect to the segregated defenses despite petitioner's timely demand for trial by jury.

Another reason for review arises when a court of appeals ". . . has decided a federal question in a way in conflict with applicable decisions of this court."[2] Such a conflict resulted from the district court's ruling that, as a matter of law, it lacked jurisdiction to consider the legality under the antitrust laws of a conspiracy that had achieved its unlawful ends *partly*

[1] Rule 19(1)(b), Supreme Court Rules.

[2] *Id.*

through use of a common carrier rate that had previously been found consistent with the requirements of the Interstate Commerce Act.

Still another reason cited by this Court which *may* move it to grant a writ is where the court of appeals ". . . has decided an important question of federal law which has not been, but should be, settled by this court."[3]

The overriding importance of the Sherman Act as a "comprehensive charter of economic liberty" for the people of this country is not open to question. *Northern Pacific Ry.* v. *United States,* 356 U.S. 1 (1958). Consequently, any judicial interpretation in derogation of that Act involving questions of law which the Supreme Court has not previously ruled upon should be deemed to raise an "important question of federal law."

In this respect, the Court of Appeals for the Ninth Circuit has affirmed two lower court rulings which held that (1) the Clayton Act statute of limitations constitutes a bar to an antitrust suit where maintenance of a joint common carrier rate, an element in the alleged conspiracy, constitutes the only known "overt" act continuing into the limitations period; and that (2) the alleged possession of monopoly power by defendants during the four years preceding suit, in violation of Section 2 of the Sherman Act, coupled with plaintiff's presence in the market as an affected competitor, does not constitute sufficient overtness to sustain a cause of action against an asserted statute of limitations defense.

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[3] *Id.*

Granting the petition with respect to the foregoing issues will afford this Court the opportunity to ensure that the small private treble damage plaintiff is a fully respected litigant in the federal courts and that Section 4 of the Clayton Act will be the vital instrument of antitrust enforcement that Congress and this Court intended it to be.

I. The District Court's Segregation of Issues for Separate Trial, Without Permitting Petitioner Any Discovery on the Merits, Was Premature, Constituted an Abuse of the Court's Discretion, and Substantially Prejudiced Petitioner's Trial Preparations.

This petition presents a noteworthy instance of precipitous application of Rule 42(b) to segregate certain factual issues for separate trial.[4] The district court, on its own motion and at the very outset, segregated two issues for separate trial: (1) whether the pertinent statute of limitations barred petitioner's suit, and (2) whether petitioner's and respondents' prior involvement in a related matter before the Interstate Commerce Commission deprived the court of jurisdiction.

The premature segregation of issues in complex antitrust cases involving small private treble damage litigants is not an isolated occurrence. It is, there-

[4] This action may explain, in part, why, in addition to other grounds for review noted herein, there is a serious question as to whether the district court's opinion comports with the requirements of Rule 52(a) of the Federal Rules of Civil Procedure that the court make specific findings of fact and conclusions of law in all cases tried before it. Although this fact in itself is not necessarily enough to justify a review, it is, as demonstrated in this petition, one of a series of ill-considered actions which should motivate this Court to resolve the issues raised herein on the basis of full briefs and oral argument.

fore, of paramount importance for this Court to establish pretrial procedural standards which will ensure not only that such litigants are accorded substantial justice, but also that Section 4 of the Clayton Act shall be, as Congress and this Court have intended, a vital adjunct to the federal government's antitrust enforcement program.

The law, of course, is clear that the trial court has the power to segregate issues for separate trial. Rule 42(b) Fed. R. Civ. P. But this should be done only "... in furtherance of convenience or to avoid prejudice ...." *Id.* Moreover, while exercise of this power is discretionary with the court, the better and safer practice is to refrain from so exercising it, especially in complex antitrust cases. *Marks Food Corp.* v. *Barbara Ann Baking Co.*, 274 F.2d 934, 936 (9th Cir. 1959); *Frasier* v. *Twentieth Century-Fox Film Corp.*, 119 F. Supp. 495, 497 (D. Neb. 1954). Indeed, *any* summary disposition of antitrust cases is not generally favored. As this Court stated in *Poller* v. *Columbia Broadcasting System*, 368 U.S. 464, 473 (1962):

> [S]ummary procedures should be used *sparingly* in complex antitrust litigation where motive and intent play leading roles, *the proof is largely in the hands of the alleged conspirators*, and hostile witnesses thicken the plot. It is only when the witnesses are present and subject to cross-examination that their credibility and the weight to be given their testimony can be appraised.

(Emphasis supplied.) This is particularly so where, as here, discovery accorded petitioner was virtually nil. The law is equally clear that segregation of issues should not be ordered if it will prejudice a party to

the proceeding. *Marks Food Corp., supra; Frasier, supra.*

In this case, petitioner was substantially prejudiced by—and the trial court abused its discretion in—segregating the issues because the statute of limitations and jurisdictional issues involved sharply contested questions of fact which were inextricably related to the basic allegations of the case as a whole and because petitioner was from the very outset deprived of any meaningful pretrial discovery going into or beyond these two issues.

Whether the statute of limitations constituted a valid defense depended on petitioner's ability or inability to discover or establish innumerable varieties of possible overt acts pursuant to the conspiracy or of predatory conduct that occurred within the four years prior to the filing of the complaint. Whether the jurisdictional defense constituted a bar to suit depended on countless unresolved questions of fact which were related to practically all of the complaint's allegations and which could not be ascertained without broad discovery. Clearly, the segregation of and ruling on the jurisdiction issue was premature and erroneous in light of the minimal discovery allowed plaintiff. Plaintiff was entitled, by adequate discovery on the overall allegations in the complaint, to try to establish this "larger scheme" going well beyond matters in the Interstate Commerce Commission proceeding before having its complaint dismissed.

The trial court's sharp confinement of discovery was clearly contrary to the letter and spirit of the discovery provisions embodied in the Federal Rules of Civil Procedure. *Roebling* v. *Anderson*, 257 F.2d 615, 620 (D.C. Cir. 1958); *June* v. *Peterson Co.*, 155 F.2d

963, 967 (7th Cir. 1946); *SEC* v. *Los Angeles Trust D & M Exch.*, 24 F.R.D. 460, 463 (S.D. Cal. 1959). The district court's denial of meaningful discovery constituted an abuse of the court's discretion. *Hickman* v. *Taylor*, 329 U.S. 495, 507 (1947), made unequivocally clear the intended role of discovery in the federal courts:

> [T]he deposition-discovery rules are to be accorded a broad and liberal treatment. No longer can the time-honored cry of "fishing expedition" serve to preclude a party from inquiring into the facts underlying his opponent's case. Mutual knowledge of all the relevant facts gathered by both parties is essential to proper litigation. To that end, either party may compel the other to disgorge whatever facts he had in his possession.

In *SEC* v. *Los Angeles Trust D & M Exch.*, *supra*, the court, in discussing the scope of discovery, stated:

> [W]e are of the opinion that discovery, however thorough, is a basic element of our Federal Civil Procedure, and is limited in theory only by the scope of protection afforded by the Fourth and Fifth Amendments of the Constitution; and in practice by the reasonable requirement that it not exceed the issues which are to be tried in the instant litigation.

24 F.R.D. at 463.

The courts have consistently recognized that liberal construction of the discovery rules is particularly appropriate in antitrust cases. *Alexander's Dep't Stores, Inc.* v. *E. J. Korvette, Inc.*, 198 F. Supp. 28 (S.D. N.Y. 1961); *American Crystal Sugar Co.* v. *Cuban-American Sugar Co.*, 23 F.R. Serv. 368 (S.D. N.Y. 1956); and *Leonia Amusement Corp.* v. *Loew's, Inc.*,

117 F. Supp. 747 (S.D. N.Y. 1954). Such cases are invariably unwieldy, complex and difficult to prove. The occasions are rare when a plaintiff can establish his case by simple, direct evidence. Most conspiracy or monopolization cases are established, if at all, after full discovery, by piecing together discovered evidence into a mosaic, as it were, from which the court may find from the fair preponderance of the evidence the alleged Sherman Act offense.

Against this backdrop, the following events occurred in the instant case which clearly establish that segregation of the above-mentioned affirmative defenses for separate trial without affording petitioner any discovery going beyond these issues constituted a gross abuse of the trial court's discretionary authority: The complaint was filed on June 8, 1967. A month and a half later, on July 27, 1967, respondents filed their respective answers thereto. Only eleven days later, on August 7, 1967, respondents took the deposition of one of petitioner's principal executive officers. Fourteen days later, on August 21, 1967, at the *first* court hearing in this case and *before* petitioner had obtained any discovery whatsoever, the trial court listened to respondents' suggestions of possible threshold issues of the statute of limitations and jurisdiction and immediately directed segregation of said issues for separate trial, sharply limiting discovery thereto.[5]

[5] It is difficult to explain the district judge's precipitate action in this regard except in terms of an inclination to cut short what promised to be a protracted, complicated, and—in his opinion—an unfounded antitrust suit. See, for example, the transcript of the *initial* court hearing wherein he "invited" respondents to move to dismiss the case. (Tr. of Proceedings August 21, 1967, at 2, which has been certified in this case.) See also his comments regarding the frivolous character of the suit and his disinclination ever to try the merits of the case. (App. 21a, 30a.)

Later, the court rejected petitioner's reasonable discovery efforts designed to elicit evidence highly relevant to the segregated issues as well as to the overall merits of its case.

That these efforts were "reasonable" is clear from a cursory review of petitioner's proposed interrogatories. (App. 51a-76a.) While at first blush they may appear to be burdensome, it is common experience that complex and unwieldy antitrust cases routinely require extensive discovery proceedings, including interrogatories, substantially broader than petitioner's. One can well envisage the sense of futility which befell petitioner at the initial court hearing when, instead of entering into customary discussions on the orderly development of pretrial discovery by all parties regarding the allegations in the complaint and the answers thereto, he was without warning confronted with the court's consideration of respondents' affirmative defenses and its decision, without briefs being filed, to limit discovery to said defenses.

That petitioner's discovery efforts were also designed to elicit highly "relevant" evidence or information which would lead to such evidence is equally clear from random examples of petitioner's interrogatories which were arbitrarily rejected (57 out of 63) by the court. For example, Interrogatory No. 6 sought, among other things, correspondence during the relevant period between GN and WP officials relating to petitioner. (App. 53a-54a.) The complaint specifically alleges that these same companies, within four years prior to the filing of the complaint, had engaged in concerted action to drive petitioner out of business. Such correspondence may well have constituted evidence or have led to evidence going to the very heart

of petitioner's case and, in particular, to rebuttal of respondents' segregated affirmative defenses.

Also, Interrogatory No. 48 sought, among other things, the names of employees of GN and WP, during the relevant period, who held meetings on the subject of log rates in the pacific northwest. (App. 70a.) Petitioner's complaint charged, *inter alia*, that GN and WP, as well as others, conspired to drive petitioner out of business by various means, including the fixing of unfair and arbitrary rates which made it difficult for petitioner to compete. Names of the railroad officials who might have known how, why and which employees of respondents established certain rates for logs shipped to Klamath Falls by petitioner and its competitor from the Lassen Forest and Ash Creek areas, respectively, was vital to petitioner's trial preparations, both as to its case-in-chief and to its rebuttal, including the segregated defenses.

Further, Interrogatory No. 56 sought, among other things, information regarding rebates or credits issued by GN during the *relevant period* and in the relevant market. (App. 73a.) The complaint alleged that among the activities respondents engaged in pursuant to the conspiracy was preferential treatment of petitioner's competitor, KBPM, which was owned by GN. It is difficult to discern how an interrogatory could be more relevant to the factual allegations in the complaint and the questions of fact raised by the segregated issues.

Finally, Interrogatory No. 35 simply requests the names of GN officials who participated in the decision leading to the establishment of log rates for petitioner. (App. 65a.) What could be more relevant to a case in which the complaint charged a conspiracy to drive

petitioner out of business by imposing onerous rates upon petitioner while granting preferential rates to its competitor, than the names of GN officials who were in a position to know whether this was so? Petitioner was entitled to at least try to obtain from these officials testimonial or documentary evidence probative of such factual allegations in the complaint or of the segregated issues.

Moreover, the highly limited discovery which petitioner was actually accorded in this case consisted, in large measure, of a few innocuous interrogatories, the answers to many of which were predictable. Nor were they significantly material to the segregated issues or to the factual allegations in the complaint. Respondents were simply not compelled to answer the extremely vital and relevant interrogatories which would have enabled petitioner to notice depositions and engage in searching examination of respondents' employees in an effort to establish the overall merits of its case as well as to rebut the affirmative defenses.

It is submitted that proceedings in this case do not conform to established notions of fairness or good practice in the federal trial courts. The correct notion is that articulated in the *Frasier* case, *supra:*

> [T]he trial piecemeal of separate issues in a single suit is not the usual course. It should be resorted to only in the exercise of *informed discretion* and in a *case* and at a *juncture* which move the court to conclude that such action will readily further convenience or avoid prejudice.

(119 F. Supp. at 497; emphasis supplied.)

Segregation in the present case occurred prematurely, abruptly and without the barest exercise of *informed* discretion. It should not be left to stand

as approved by the court of appeals. The court's segregation of issues for separate trial was not based on "informed discretion", since it was done at the outset of the initial hearing without the matter being properly briefed; or done in a proper "case", since this was a complex antitrust suit; or ordered at the proper "juncture", since petitioner had not, as yet, had the benefit of any discovery which might have shed some light on the scope of factual matters related to the segregated issues or to the allegations in the complaint.

All petitioner sought was a reasonable opportunity, by utilizing the liberal rules of discovery, to develop evidence probative of its case and to rebut the issues segregated for separate trial—an opportunity which it was arbitrarily denied. The foregoing conduct represents such a stark departure from the accepted and usual course of judicial proceedings as to warrant this Court's exercise of its supervisory powers over the federal judiciary.

II. The Lower Courts Plainly Ignored the Facts and Established Precedent in Dismissing Petitioner's Allegations of Sherman Act Violations on the Basis of a Prior Interstate Commerce Commission Proceeding Involving the Same Rates.

Petitioner was foreclosed from a legitimate business venture by prohibitive railroad tariffs. He complained to the Interstate Commerce Commission that the tariffs were illegal under the Interstate Commerce Act. The Commission held that the tariffs were not illegal under *that* Act. Petitioner subsequently filed an antitrust suit alleging that the onerous tariffs resulted from a conspiracy by the respondent-carriers to restrain him from competing and to monopolize the relevant market

for the benefit of a competing lumber mill affiliated with one of the carriers.

The lower courts found lack of jurisdiction to entertain the antitrust complaint because the Commission had previously ruled upon these same rates.

The district court saw the issue squarely:

> whether—"*all* of defendants' alleged illegal activities concern rates which the Interstate Commerce Commission approved."

(App. 77a; emphasis supplied. *See also* App. 78a.) Finding that they did,[6] the court concluded it lacked

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[6] Here the court strained to overlook the testimonial evidence of petitioner's principal executive officer, Robert P. Ellingson, Jr., whose deposition was taken before plaintiff had had the benefit of any pretrial discovery whatsoever. (Def.'s trial exhibit 31.) Mr. Ellingson's testimony alleged at least the following facts which were completely uncontroverted at trial and which are instructive as to the substantially different and greater scope of the antitrust complaint: (1) that GN threatened to deprive Ellingson of freight cars unless Ellingson gave GN all its shipments to the east (p. 52, lines 4-6; p. 59, lines 6-13); (2) that GN cut the log rate from Ash Creek to Klamath Falls for the benefit of its own mill (p. 52, lines 7-11; p. 58, lines 2-12); (3) that Ellingson was deprived of a log dump and required to pay switching charges not imposed on other shippers (p. 61, lines 13-25 to page 62, lines 1-13; p. 63, lines 2-21; p. 64, lines 6-19; p. 68, line 25; p. 69, lines 1-13); (4) that GN furthered its conspiracy to drive Ellingson out of business by selling a competing saw mill at Klamath Falls at a price far below the market value of the property and without giving competing mills an opportunity to bid thereon (p. 80, lines 4-25 to p. 81, lines 1-25 to p. 82, lines 1-25); (5) that GN engaged in an unfair business practice in the manner in which it leased its saw mill in Klamath Falls and in giving preferential rates to the operator thereof (p. 86, line 24 to p. 88, line 10; p. 90, lines 11-23, p. 111, lines 3-14); (6) that defendants restrained Ellingson from marketing products except in certain designated and prescribed areas (p. 91, lines 11-25); and, (7) that defendants refused to extend the same facilities and terms to petitioner which were extended to petitioner's competitors (p. 105, line 4 to p. 106, line 1).

jurisdiction to consider possible application of the Sherman Act to allegations that the "legal" tariffs were part of a conspiracy to destroy petitioner and monopolize the relevant market in which petitioner was competing with defendant GN's affiliate.

This case, despite the terminology loosely applied in the lower courts, was not argued below on an issue of *primary* jurisdiction, *i.e.*, it was never asserted that rates subject to administrative regulation were the "sole" or "primary" issue in the case and thus compelled *initial* proceedings by the regulating agency. *United States* v. *Radio Corp. of America*, 358 U.S. 334, 348 (1959); *Federal Maritime Bd.* v. *Isbrandtsen Co.*, 356 U.S. 481, 498-99 (1958); *Far East Conference* v. *United States*, 342 U.S. 570, 574-75 (1952); *Riss & Co.* v. *Ass'n of American R.R.*, 170 F. Supp. 354 (D. D.C.), 267 F.2d 659 (D.C. Cir.), *cert. denied*, 361 U.S. 804 (1959); *Atchison, Topeka & Santa Fe Ry. Co.* v. *Aircoach Transp. Ass'n*, 253 F.2d 877 (D.C. Cir. 1958), *cert. denied*, 361 U.S. 930 (1960).

No one suggested suspending district court proceedings in favor of *preliminary* agency consideration. After all, there had already been administrative proceedings in this case concerning the legality of the pertinent rates under the Interstate Commerce Act. Of course, the Commission had *not* considered application of the antitrust laws, and rightly so. As this Court has made clear: The Commission is not empowered to interpret or enforce the antitrust laws. *American Tobacco Co.* v. *United States*, 328 U.S. 781 (1946); *Georgia* v. *Pennsylvania Railroad Co.*, 324 U.S. 439 (1945); *McLean Trucking Co.* v. *United States*, 321 U.S. 67, 79 (1944).

If, then, the antitrust issues were not before the Commission and that body had completely exercised its administrative function in the case, where was any jurisdictional basis for dismissing the antitrust suit?

What the courts below *did*, somehow, was to read the antitrust allegations entirely out of the complaint. They viewed the complaint simply as charging discriminatory rates under the Interstate Commerce Act. To the extent the Commission had previously held part of the tariff—the "cutback" provision—illegal, there was, the court reasoned, an "election of remedies" under applicable statutes and cases (49 U.S.C. § 9; *Standard Oil Co.* v. *United States*, 283 U.S. 235, 240-41 (1931)) which, again, had nothing whatsoever to do with an antitrust cause of action.

The question at this juncture is not whether a rate we assume is legal under the Interstate Commerce Act can nevertheless be illegal under the Sherman Act. This Court and many others have answered that question affirmatively on numerous occasions. *Riss & Co.* v. *Ass'n of American Railroads, supra; Noerr Motor Freight, Inc.* v. *Eastern R.R. Presidents Conference*, 155 F. Supp. 768, 814-16, 822-25 (E.D. Pa. 1957), *aff'd*, 273 F.2d 218 (3d Cir. 1959), *rev'd on other grounds*, 365 U.S. 127 (1961); *cf. United States* v. *Philadelphia Nat'l Bank*, 374 U.S. 321 (1963); *Pan American World Airways, Inc.* v. *United States*, 371 U.S. 296 (1963); *Maryland & Virginia Milk Producers Ass'n, Inc.* v. *United States*, 362 U.S. 458 (1960). The *Keogh*[7] *Terminal Warehouse*[8] line of cases relied upon by the courts below are irrelevant here. In the

[7] Keogh v. Chicago & N.W. Ry., 260 U.S. 156 (1922).

[8] Terminal Warehouse v. Penn. R.R., 297 U.S. 500 (1936).

latter case Justice Cardozo explicitly excluded from those holdings a case where a carrier had confederated with a competitor of the complaining shipper to restrain competition or foster a monopoly. In such a case, he wrote:

> [T]he carrier would make itself a participant in the monopoly it had conspired to produce, *though its only overt act was a discriminatory rate of carriage.*

(297 U.S. at 515; emphasis supplied.)

The question, again, is simply whether the lower courts were correct in ignoring entirely the antitrust aspects of the complaint. This necessarily relates back to the district court's segregation of issues for separate trial.

If the court were correct in requiring petitioner to prove its entire antitrust case after discovery which was sharply limited to the two segregated issues, then the court might legitimately have found that no substantial antitrust allegations had been *proved* at that juncture. If that were all the "trial" petitioner could expect, then the court could properly dismiss the complaint as unsupported by sufficient evidence. But there was no imaginable basis for the court to dismiss the complaint on *jurisdictional* grounds.

The sheer and simple *wrong* of the lower courts' reasoning on the jurisdictional issue should warrant review by this Court in the exercise of its supervisory responsibility over the federal judiciary. *Brunner* v. *United States*, 343 U.S. 112 (1952). Also, such review is warranted because the lower courts have decided a federal question in a way which directly conflicts with applicable decisions of this Court. In this respect, despite its confusion, the case provides a precedent

that should not be permitted to stand. As more and more of the important antitrust cases coming before the courts involve companies in regulated industries,[9] precedents such as the instant case, as decided thus far, cannot help but have a confounding and inhibiting effect.

III. The Lower Courts' Application of the Clayton Act's Statute of Limitations Was Incorrect on the Facts and Law and Constitutes a Stifling Precedent for Private Antitrust Enforcement.

This Court has often stressed the vital role of private antitrust actions in furthering antitrust policy, and it has expressed concern lest lower court decisions inhibit private enforcement.[10] Yet despite countless private suits that have at once revealed, halted and punished serious incursions on the public interest, some lower courts continue to treat the treble damage plaintiff as a second-class litigant. This petition presents a prime example. And the lower courts' disposition of the statute of limitations issue in this case

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[9] *See* Federal Maritime Comm. v. Aktiebolaget Svenska Amerika Linien (Swedish American Line), 390 U.S. 238 (1968); United States v. El Paso Natural Gas Co., 376 U.S. 651 (1964); United States v. Philadelphia Nat'l Bank, 374 U.S. 321 (1963); Silver v. New York Stock Exchange, 373 U.S. 341 (1963); Far East Conference v. United States, 342 U.S. 570 (1952); Kaplan v. Lehman Bros., 250 F. Supp. 562 (N.D. Ill. 1966), *aff'd*, 371 F. 2d 409 (7th Cir.), *cert. denied*, 389 U.S. 954 (1967); *Symposium: Antitrust and Monopoly Policy in the Communications Industries*, 13 ANTITRUST BULL. 871 (1968).

[10] Perma Life Mufflers v. International Parts, 392 U.S. 134, 136 (1968); Hanover Shoe, Inc. v. United Shoe Mach. Corp., 392 U.S. 481, *reh. denied*, 393 U.S. 901 (1968); Leh v. General Petroleum Corp., 382 U.S. 54 (1965), *reh. denied*, 382 U.S. 1001 (1966); Minnesota Mining & Mfg. Co. v. New Jersey Wood Finishing Co., 381 U.S. 311 (1965).

is a prime example of shortcut legal reasoning aimed at ridding the docket of a complicated and potentially protracted antitrust suit.

Admittedly, application of the Clayton Act's four-year statute of limitations has offered many courts a fertile field for shortcut reasoning.[11] This, quite apart from the injustice in the present case, is ample reason for this Court to grant the instant petition and provide much-needed guidance to the lower courts on statute of limitations issues in private antitrust actions.

The district court dismissed petitioner's complaint on the ground, *inter alia*, that "overt" acts alleged to have been committed by the defendants ceased more than four years prior to the filing of the complaint. Concededly, injury to the petitioner—culminating in the liquidation sale of its affected facility—occurred within the statutory period. Concededly, the complaint *alleged* acts in furtherance of an illegal conspiracy by defendants continuing into the statutory period.[12] Further, although it was completely ignored by the lower courts, the complaint alleged monopolization and attempts to monopolize continuing *into* the statutory period.

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[11] *See* Millstein, *Current Status of Affirmative Defenses, Including the Passing-on Defense, in Pari Delicto and Statutes of Limitations*, 38 A.B.A.J. ANTITRUST L.J. 111 (1969).

[12] Petitioner alleged, and was prepared to rely upon evidence of, acts occurring more than four years prior to the filing of the complaint to establish defendants' violations of the Sherman Act. Such evidence, while entirely admissible, Dovberg v. Dow Chemical Co., 195 F. Supp. 337, 343 (E.D. Pa. 1961), *aff'd*, 353 F.2d 963 (3d Cir. 1965), *cert. denied*, 384 U.S. 907 (1966), was not the basis for petitioner's allegations of overt acts and injury within the limitations period. Yet the district court considered *only* this evidence with respect to the limitations defense.

These allegations alone place the bare complaint beyond any defense based upon the Clayton Act's statute of limitations. If, however, the district court was within permissible bounds in segregating the limitations issue for separate trial and if the proceeding held by the court on March 4, 1968, could be seriously construed as an adequate trial, then we must disregard the quite ample allegations of the complaint and consider whether on the facts stipulated or proved at "trial" there were overt acts *and* resulting injury to petitioner within four years prior to suit. There is no quarrel over injury. The issue on the facts in evidence at trial is whether *maintenance* of the joint rate, which petitioner alleged as *an* act in furtherance of the illegal conspiracy, was itself "overt".

This case is particularly suited for review because the court of appeals' decision establishes the highly undesirable precedent that *maintenance* of a joint rate by regulated common carriers in furtherance of an illegal conspiracy is not an "overt act" for purposes of the statute of limitations. While purporting to follow the long line of "continuing conspiracy" authorities in which the courts have confined the period of liability based upon positive conduct by conspirators,[13] the court of appeals here clearly broke new ground in treating the continuing and publicly notorious barrier of a predatory common carrier rate as devoid of "overt" qualities.

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[13] *See, e.g.*, Crummer Co. v. DuPont, 223 F.2d 238 (5th Cir.), *cert. denied*, 350 U.S. 848 (1955); Susser v. Carvel Corp., 206 F. Supp. 636 (S.D. N.Y. 1962), *aff'd*, 332 F.2d 505 (2d Cir. 1964), *cert. dismissed as improvidently granted*, 381 U.S. 125 (1965); Service Stages, Inc. v. Greyhound Corp., 170 F. Supp. 482 (N.D. Ga.), *aff'd*, 268 F.2d 739 (5th Cir. 1959); Emich Motors Co. v. General Motors Corp., 15 F.R.D. 354 (N.D. Ill. 1955), *aff'd*, 229 F.2d 714 (7th Cir. 1956).

Contrary to the understanding of the courts below that petitioner's case rested upon an interpretation of overtness confined to criminal cases, petitioner is content with the requirement that it prove overt acts *and* injury within four years preceding the filing of the complaint.[14] We need only urge recognition of the overtness implicit in the "continuing and accumulating harm"[15] imposed by an illegal common carrier rate on a shipper, the petitioner, who during the four years preceding suit was capable and desirous of competing in a market foreclosed, in part, by that rate.

This Court recently recognized in the *Hanover Shoe* decision the continuing overt nature over some 43 years of an illegal corporate *policy* not to sell particular equipment but only to lease it. The policy, like the rate, was a silent, unyielding dead weight on competition—requiring no periodic action or maneuver to effectuate. The difference between the policy in

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[14] Garelick v. Goerlich's, Inc., 323 F.2d 854 (6th Cir. 1963); Steiner v. Twentieth Century-Fox Film Corp., 232 F.2d 190 (9th Cir. 1956); Laitram Corp. v. Deepsouth Packing Co., 279 F. Supp. 883 (E.D. La. 1968); Delta Theatres v. Paramount Pictures, 158 F. Supp. 644 (E.D. La.), *appeal dismissed*, 259 F.2d 563 (5th Cir. 1958); Winkler Koch Eng'r Co. v. Universal Prod. Co., 96 F. Supp. 1014 (S.D. N.Y. 1950), *aff'd on rehearing*, 100 F. Supp. 15 (S.D. N.Y. 1951). The confusion in the most frequently cited cases, primarily district court decisions, is dramatically illustrated in the disjointed analysis below. While many opinions agonize over the simple principle of the concurrence of overt act and injury, *e.g. Laitram*, *supra*, at 887-91; *Emich*, *supra*; Farbenfabriken Bayer v. Sterling Drug, Inc., 197 F. Supp. 627 (D. N.J. 1961), *aff'd*, 307 F.2d 210 (3d Cir. 1962), *cert. denied*, 372 U.S. 929 (1963), never yet in an antitrust context has a court gone to some pain to analyze what an overt act is, or, more importantly, what, as a matter of antitrust policy, we should encompass within that term.

[15] Hanover Shoe, Inc. v. United Shoe Mach. Corp., 392 U.S. 481, 502, n. 15, *reh. denied*, 393 U.S. 901 (1968).

Hanover and the rate in this case is that while the policy only *inhibited* competition, the rate *prevented* competition during the four years preceding suit. Thus the instant case offers a stronger basis than *Hanover* for finding the requisite continuing overtness.

This reasoning need not leave open forever the limitations period in antitrust causes based upon rates illegal under Section 1 of the Sherman Act. In monopoly cases under Section 2 of the Act, it is well established that the continuing overtness inherent in the existence of monopoly power must be accompanied by the existence of competitive capability on the part of the injured party.[16] Had petitioner retired from all competitive activities in the relevant market five years before filing suit and had it sold its facilities two years later, within the limitations period, the cause of action presumably would not survive the limitations defense. But, in fact, within four years preceding its complaint, petitioner was not only capable of competing with the mill affiliated with the defendants but was in open competition with it.[17] There is no reason to apply a different rule here where Section 1 of the Sherman Act is the basis of the lower courts' ruling than where continuing monopoly power is at issue under Section 2.[18]

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[16] *See, e.g.*, La Rouche v. United Shoe Mach. Corp., 166 F. Supp. 633 (D. Mass. 1958).

[17] Plaintiff's Exhibit Nos. 3 and 4 in the district court show that considerable Lassen Forest timber was available to petitioner between 1961 and 1966 if it could have been shipped on defendants' facilities and that considerable competitive shipments were made by defendant GN's affiliated mill into the western markets from which petitioner was foreclosed.

[18] *See* Highland Supply Corp. v. Reynolds Metals Corp., 327 F.2d 725 (8th Cir. 1964).

This court should also take notice of the fact that the complaint in this case alleged the possession of monopoly power by defendants during the four years preceding suit in violation of Section 2 of the Sherman Act. As the court held in *Highland Supply*, such power, coupled with petitioner's presence in the market as an affected competitor, is itself sufficient overtness to sustain the cause of action. But the lower courts completely overlooked this element in the case.

This Court's responsibility to supervise the federal courts, as well as its reluctance to allow such obvious error to stand, should militate strongly in favor of granting this petition.

IV. Petitioner Was Deprived of and Did Not Waive Its Constitutional Right to Trial by Jury on the Segregated Factual Issues.

In the proceedings below the plaintiff was deprived of its constitutional right to have a jury determine the relevant issues of fact. The right was not waived as the Court of Appeals for the Ninth Circuit held. (App. 84a.)

Questions of fact in private antitrust actions are triable before a jury, *Fleitman* v. *Welsbach Street Lighting Co.*, 240 U.S. 27, 29 (1916), and this right applies fully to preliminary procedural matters and affirmative defenses if there are, as here, material factual issues presented. *Bertha Building Corp.* v. *National Theatres Corp.*, 248 F.2d 833 (2d Cir. 1957), *modified on rehearing on other grounds, cert. denied*, 356 U.S. 936 (1958); *Marks Food Corp.* v. *Barbara Ann Baking Co.*, 274 F.2d 934 (9th Cir. 1959). Once proper demand for jury trial is made it can only be lost by *express* consent of the demanding party. *Scott* v. *Neely*, 140 U.S. 106, 109-10 (1891).

Demand for jury trial was properly and timely made and served in the present case. The complaint was captioned "Action At Law for Monopoly and Restraint of Trade and Attempted Monopolization and *Request for Jury Trial.*" (App. 7a; emphasis supplied.) At the end of the complaint the further notation appears: "Plaintiff respectfully requests a trial by jury." (App. 14a.) The jury demand was noted on the docket pursuant to Rule 39(a). (App. 1a.) By the explicit terms of the Federal Rules and the cases decided thereunder, waiver of this properly asserted right could have been made only by a written stipulation on petitioner's part and filed with the court or by an oral stipulation made in open court and entered on the record. (Fed. R. Civ. P. 39(a).) Neither occurred in the instant case. The district court never even considered whether the "trial" on the segregated issues could be held without a jury in view of petitioner's demand.

The Court of Appeals for the Second Circuit has upheld the right to a jury trial where these waiver provisions have not been exercised, even in situations when, as in the present case, the issue of the empaneling of a jury was not raised again after the initial demand was made. In *DeGioia* v. *United States Lines Co.*, 304 F.2d 421 (2d Cir. 1962), the court said that the "[defendant] had never withdrawn its claim for a jury trial and was therefore entitled to such a trial. F.R. 39(d), 39(a).[1] "[19]

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[19] The indicated footnote 1 states:

> After making its initial demand, [defendant] apparently did not explicitly raise the question again. The court . . . determined that the third-party action would be tried to the jury in an advisory capacity and on a separate charge. Both

The right to a jury trial is so fundamental that a very strong presumption is entertained against its waiver. *Dimick* v. *Schiedt*, 293 U.S. 474, 486 (1935). In *Beacon Theatres, Inc.* v. *Westover*, 359 U.S. 500 (1959), this Court stressed the special importance of jury trial in antitrust cases and, significantly, noted that the discretion granted by Rule 42(b) could not be used to "compel Beacon to split his antitrust case, trying part to a judge and part to a jury." *Id.* at 508.[20]

The district court may well have been confused initially as to whether it was segregating legal issues for summary judgment or factual issues for separate trial. This confusion apparently facilitated the court's failure to take cognizance of petitioner's jury demand, even though it was clear that the statute of limitations and jurisdictional issues were permeated with unresolved factual issues going to the very heart of the

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> [defendants] objected to this, but the grounds of the objection were unclear. While [defendant's] failure explicitly to urge its original demand [for jury trial] in the subsequent proceedings added to the confusion surrounding the issue of jury trial, it cannot be considered a waiver of this vital and cherished right. *The principle of waiver by failure to make timely claim, F.R. 38(d), is limited by the explicit provision of F.R. 39(a), that once a demand for jury trial has been made it can be waived only by an oral stipulation made in open court and entered on the record or by written stipulation.* (Emphasis supplied.)

[20] The discretion given the trial judge under Rule 42(b) does not include the power to abrogate the right to a jury trial. Rather, that rule specifically retains that right:

> The court . . . may order a separate trial of any claim . . . or of any separate issue . . . *always preserving inviolate the right of trial by jury as declared by the Seventh Amendment to the Constitution or as given by a statute of the United States.*

Fed. R. Civ. P. 42(b). (Emphasis supplied.)

antitrust allegations. *See Andreas* v. *Imperial Airlines, Inc.*, 211 F. Supp. 311, 313 (E.D. Pa. 1962). The district court seemed to sense the existence of disputed factual issues. Following its initial "invitation" to respondents to move for dismissal of the case,[21] the court subsequently executed an aboutface, noting that:

> [T]his is a dangerous case to try on a motion to dismiss and summary judgment. I am going to set it down for pretrial. *You can set out all these facts.* Then we are going to have segregated issues on some of these defenses. We are going to have a trial on the statute of limitation. We will have a trial on the issue of whether these acts were within the jurisdiction of the Interstate Commerce Commission. (Tr. of Proceedings August 21, 1967, at 4; emphasis supplied.)

Defendants' counsel also seemed to sense this:

> MR. CORY [in response to the court's inquiry]: Well the Court's jurisdiction over a regulated industry is not a question of law in a vacuum. It is—*it has to be looked at in the contention of the particular complaint for treble damages.*

(App. 17a; emphasis supplied.)

In spite of this recognition, the trial judge violated both the dictates of the rule under which he purported to act and the binding precedent in his Circuit. *Marks-Food Corp.* v. *Barbara Ann Baking Co.*, 274 F.2d 934 (9th Cir. 1959). In that case, which is strikingly similar to this one, the Ninth Circuit held that where grocers brought a private antitrust action against a bakery and demanded a jury trial, it was error for the trial judge to try the issue of subject matter juris-

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[21] *Supra*, note 5.

diction (interstate commerce) separately and ahead of the other issues in the case without the aid of a jury. The court so held largely because Rule 42(b) "does not sanction the switching of the separated issues in a jury case from the jury to the judge" and because it is not proper "to separate the subject matter jurisdiction issue for separate trial in cases where the factual merits of the case must be considered in deciding the separated issue." 274 F.2d at 936.

The trial judge was apparently impervious to this clear and binding precedent, since he nevertheless proceeded to hold a trial involving disputed issues of fact clearly within the province of a jury. This constituted a radical departure from the accepted and usual course of judicial proceedings. It should have been corrected by the court of appeals *sua sponte* just as it should have been *noticed* by the trial court on its own initiative. Such fundamental rights should not be so lightly waived or so easily overlooked. In keeping with the spirit of Rule 19, this Court should correct this serious deprivation of a constitutional right as one of several serious derelictions in the conduct of this case.

CONCLUSION

For the reasons stated above, this petition for writ of certiorari should be granted.

Respectfully submitted,

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September 18, 1970

APPENDIX A

District Court Docket Entries

DATE; PROCEEDINGS.

1967

June 8—Filed Complaint and Demand for Jury Trial *

June 8—Issued summons to Marshal

June 16—Filed Summons with Marshal's return

June 27—Filed Stipulation that deft., Great Northern Railway Co., may have to and including July 27, 1967 within which to make an appearance, with Clerk's endorsement granting stipulation

June 28—Filed Stipulation that defendant Western Pacific Railroad Co. may have an extension of time to and including July 27, 1967, within which to appear, with Clerk's endorsement granting stipulation

*July 27—Filed Answer of Deft Great Northern R.R. Co.**

*July 27—Filed Answer of Deft Western Pacific R.R. Co.**

[Aug. 7—On this date defendants took the deposition of Robert P. Ellingson, Jr., Plaintiff's chief operating officer]

Aug. 21—Entered Order setting for pretrial on segregated issues 10/16/67 *

Aug. 21—Pretrial order to be submitted on issues of Statute of Limitation and question of jurisdiction

Aug. 25—Filed Interrogatories

Sept. 1—Filed Objections of Great Northern Railway Co. to Interrogatories

Sept. 5—Filed Answers of Defendant, Great Northern Railway Company to Plaintiff's Interrogatories

Sept. 7—Filed Clerk's Copy of Reporter's Transcript of Proceedings, dated 8/21/67

Sept. 7—Entered Order resetting objections to interrogatories to 9/25/67

Sept. 25—Record of hearing on Objection to Interrogatories

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*Emphasis supplied.

Sept. 25—Entered Order taking under advisement

Sept. 27—Entered Order setting hearing on pending objections to interrogatories before Judge Solomon 10/16/67, 1:30 p.m.

Sept. 27—Filed Plaintiff's Motion to Change place of trial from Portland, Oregon to Medford or Eugene, Oregon

Oct. 12—Filed Points and Authorities of Great Northern Railway Company in Support of Objections to Interrogatories

Oct. 16—Record of Pretrial Conference

Oct. 16—Record of hearing on Objections to Interrogatories and Motion to Change Place of Trial.

Oct. 16—Entered Order allowing plaintiff 2 weeks to revise interrogatories, to 10/30/67

Oct. 16—Entered Order resetting for Call 12/18/67 at 10:00 A.M.

Oct. 25—Filed Supplemental Answer of Deft. Great Northern Railway Co. to Plff's Interrogatory No. 1

Oct. 25—Filed Interrogatories Relating to Jurisdiction to Great Northern Railway Co.

Nov. 6—Filed Answers of Deft Great Northern Railway Co. to Pltff's Interrogatories Relating to Jurisdiction

Nov. 6—Filed Objections of Great Northern Railway Co. to Pltff's Interrogatories Relating to Jurisdiction

Nov. 14—Filed Statement and Memorandum with respect to interrogatories relating to jurisdiction

Nov. 20—Record of hearing on Objections to Pltff's Interrogatories relating to jurisdiction

Nov. 20—Entered Order that if counsel cannot determine matter deft. should file argument and briefs by 11/27/67; ptff file arguments and briefs by 12/4/67 and these arguments and briefs will be referred to Judge Solomon for a ruling

Dec. 18—Filed Notice of Hearing (1/8/68)

Dec. 18—Entered Order that Pretrial Order by lodged by 1/15/68

Dec. 18—Entered Order that Judge Solomon give case a trial date when PTO lodged

Dec. 20—Lodged Pretrial Order with Respect to Court's Jurisdiction Over the Subject Matter

Dec. 21—Entered Order setting for pretrial conference and hearing on Objections to Interrogatories on Tuesday, 1/2/68, at 9:00 A.M.

1968

Jan. 2—Record of pretrial conference.

Jan. 2—Entered Order that parties re-type draft of pretrial order and submit Jan. 5, 1968.

Jan. 2—Entered Order that Roger Tilbury file supplemental list of Interrogatories relating to question of jurisdiction.

Jan. 2—Entered Order segregating issues of Statute of Limitation and Jurisdiction.

Jan. 2—Entered Order setting for trial week of March 4, 1968, on segregated issues; setting for final pretrial conference Jan. 29, 1968, at 9:30 A.M.

Jan. 29—Pretrial Order Lodged.

Jan. 29—Record of Pretrial Conference.

March 1—Lodged Plaintiff's ~~Memorandum~~ Regarding Statute of Limitations Defense.

March 1—Record of pretrial conference (Briefs submitted)

March 4—Record of trial before the Court

~~Pretrial Order signed, entered and filed~~

Evidence adduced by plaintiff (Has burden of proof)

ORDER CASE SUBMITTED ON THE MERITS

March 5—Lodged Supplemental Memorandum of deft Great Northern Railway Co. as to Statute of Limitations

March 5—Lodged Plaintiff's Supplemental Memorandum Regarding the Statute of Limitations Defense.

March 5—Filed Plaintiff's Response to Supplemental Memorandum of Defendant, Great Northern, Relating to Limitations.

March 15—Lodged Reply of Western Pacific to Plaintiff's Supplemental Memoranda.

March 27—Filed Transcript of Proceedings, March 4, 1968.

June 20—Filed Praecipe (Letter) to issue two new sets of Summons.

June 21—Issued Summons to Marshal for service on Western Pacific Railroad Co., San Francisco. Four week.

June 21—Issued Summons to Marshal for service on Western Pacific Railroad Co. by serving Corporation Commissioner.

June 20—Filed and Entered Opinion and Order.

(m 6/21/68)

June 20—Filed and Entered Judgment of Dismissal.

July 16—Filed plaintiff's notice of appeal—copies mailed to counsel

July 16—Filed undertaking on appeal (attached to notice)

July 23—Filed Summons with Marshal's return. (Corp. Comm.)

Filed Summons with Marshal's return.

July 29—Filed Motion of deft. Western Pacific Railroad Co. to Quash Summons and Service of Complaint.

Aug. 12—Entered Order that defendant's motion to quash summons, etc. is allowed.

Aug. 14—Filed and Entered Order allowing deft's motion to quash.

Aug. 20—Filed Stipulation re retaining records on appeal until final brief

Aug. 21—Filed and entered Order to retain record on appeal

Aug. 22—Mailed certified copy order retaining record and transcript of docket entries to Court of Appeals. Counsel notified.

Aug. 23—Filed supplemental transcript of proceedings October 16, 1967 and January 2, 1968

Sept. 13—Filed Designation of parts of the record to be included in the appendix.

Sept. 13—Filed Statement of the Issues upon which plaintiff intends to present for appellate review

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June 4—Mailed original and one copy clerk's record on appeal, original and one copy reporter's transcript of proceedings of March 4, 1968 to Court of Appeals at the request of counsel for appellant. Counsel notified. All Exhibits mailed to Court of Appeals.

July 25—Mailed following memorandums to Court of Appeals pursuant to request of Mr. Cosgrave: Plaintiff's Memo. Re Statute of Limitations, Pltf's. Memo Re Primary Jurisdiction Defense, Pltf's Supp. Memo RE Primary Jurisdiction Defense, Pltf's. Response to Supp. Memo of Def. Great Northern, Relation to Limitations. Counsel notified.

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May 25—Received and filed Judgment, Original Record, Exhibits, and Transcript of Proceedings dated March 4, 1968, (one volume) from Court of Appeals

May 25—Filed Opinion

May 25—Filed Cert copy of Judgment affirming decision of District Court; costs in Court of Appeals in favor of the appellees and against the appellant (brief of appellee Western Pac. $330.00; brief of appellee Great North $245.70—total of $575.70)

APPENDIX B

Complaint

IN THE UNITED STATES DISTRICT COURT
FOR THE DISTRICT OF OREGON

No. 67-316

ELLINGSON TIMBER CO., Plaintiff,

vs.

GREAT NORTHERN RAILWAY COMPANY, a Corporation; WESTERN PACIFIC RAILROAD COMPANY, Defendants.

Action at law for monopoly and restraint of trade and attempted monopolization and request for jury trial.

For cause of action, plaintiff respectfully alleges:

I.

Jurisdiction

Jurisdiction is founded upon the Sherman Act, Ch 647, 26 Stat. 209, July 2, 1890, Title 15 U.S.C. #1-8, and upon subsequent amendments thereto, and upon the presence of a federal question, as well as diversity of citizenship.

II.

Venue

Venue is founded on U.S.C. Title 28, #1391, and the fact that defendant, Great Northern Railway Company, is a Minnesota corporation with its principal office in St. Paul, Minnesota, and engaged in business in Oregon, while defendant, Western Pacific Railroad Company, is a California corporation, with its principal office in San Francisco, California, and is engaged in business in Oregon. Plaintiff is an Oregon corporation and is engaged in business principally in this State.

III.

Parties

(a) Plaintiff, Ellingson Timber Co., is an Oregon corporation, which for many years operated lumber mills in the vicinity of Klamath Falls, Oregon, among other locations.

(b) Defendant, Great Northern Railway Company, is a Minnesota corporation.

(c) Defendant, Western Pacific Railroad Company, is a California corporation.

IV.

Definitions

The term, "Defendant" or "Defendants" or "conspirator" or "co-conspirators" shall include all subsidiaries and other affiliated companies which it, he or they control or operate. It shall also include all acts committed by its, his or their employees, servants, agents or representatives acting within the scope of their employment for defendant or defendants. The term, "Great Northern" shall refer to defendant, Great Northern Railway Company. The term "Western Pacific" shall refer to defendant, Western Pacific Railroad Company.

V.

Commerce

Defendant, Great Northern Railway Company, is one of the largest rail carriers in the United States, operating a railroad system in excess of 8,200 miles principally through the North Central plains and Pacific Northwest, and with a senior working capital in excess of $200,000,000, and annual gross revenues which normally exceed $250,000,000. Much of this revenue is derived from the interstate transportation of commodities and passengers in interstate com-

merce between the several states serviced by the Great Northern. Among other multitudinous products transported by the Great Northern are lumber and timber and related products, iron ore, wheat, barley and rye, which represent some of its largest revenue items. Great Northern has close affiliations with the Northern Pacific Railway Company and with Chicago, Burlington & Quincy Railroad Company, both substantial carriers in their own right.

Defendant, Western Pacific Railroad Company, operates a railroad system of more than 1300 miles, principally from Oakland, California to Salt Lake City, Utah, with numerous connecting lines and feeders. It also provides a link in a through route to Chicago, Illinois, and forms the center link of an important north-south route along the Pacific Coast. It has a senior capital in excess of $66,000,000, and has a gross annual revenue which has exceeded $60,000,000 in recent years. Most of the transportation which it provides consists of products which move in the channels of interstate commerce. Some of the chief products which it transports are lumber and timber and related products, food and food products, primary metals, vehicle and vehicle parts. Western Pacific has also pursued an active course of acquiring proprietary interests in other railroad companies. Among other such interests, Western Pacific is reported to own more than 450,000 shares of stock in the Atchison, Topeka and Santa Fe Railway Company (the largest road in mileage in the United States), 35,000 shares of the Northern Pacific Railway Company (a close affiliate of defendant, Great Northern Railway Company), and 22,800 shares of Southern Pacific Company (which operates a system of more than 14,000 miles). In these three carriers, defendant, Western Pacific, has investments of approximately $21,000,000.

In connection with the conduct of its business, plaintiff and its assignee, Ellingson Lumber Company, acquired much of its products from points in California, as well as

Oregon, and it was thereafter transported in many instances over the rail lines of defendants, Western Pacific and/or Great Northern to plaintiff and its assignee's mills in the Klamath Falls area, where it was manufactured into lumber. Thereafter, the finished products were again transported in many instances by defendants, Western Pacific and/or Great Northern to customers in many instances in other parts of the United States. The production, manufacture, fabrication, delivery and sales to ultimate consumers under such circumstances are and were in the stream of interstate commerce and serve as mere conduits for the eventual delivery and sale of such products to consumers. Delivery of products by plaintiff to defendants in such fashion was reasonably continuous, and it was intended and recognized that such lumber and timber products would eventually be resold to customers, brokers, wholesalers and the like in many states besides those in the Pacific Northwest. Such procurement and sale of timber and lumber products directly affect the total volume of such products shipped into and without the State of Oregon and California, and affect, alter and modify the total volumes shipped and delivered in interstate commerce.

VI.

Assignment

Prior to the institution of this action, for value received, plaintiff's assignee, Ellingson Lumber Co., assigned its cause of action against defendants to plaintiff herein. Ellingson Lumber Co. is a copartnership, operated by members of the same family who operate Ellingson Timber Company, composed of R. P. Ellingson, M. T. N. Ellingson, Robert P. Ellingson, Jr., Donald M. Ellingson, Sigmund H. Ellingson, and Dorothea B. Balderson. Ellingson Lumber Co., also engaged in the general lumber business in the vicinity of Klamath Falls, Oregon, and other locations.

VII.

Co-Conspirators

Whenever the term "Co-Conspirator" or "Co-Conspirators" is used in this Complaint, it shall refer to the following corporation, partnership and individuals unless otherwise stated:

Chiloquin Timber Company, Inc., a Washington corporation;

Klamath Basin Pine Mills Co., a copartnership composed of A. N. Beals, King Gray, Wilbur L. Kesterson;

M. A. Wyman, M. H. Wyman, D. E. Wyman and W. I. Kesterson.

VIII.

Conspiracy To Monopolize and Restrain

Within a period less than four years prior to filing this complaint, and commencing prior thereto, but continuing thereafter, defendants, Great Northern Railway Company and Western Pacific Railway Company, and the co-conspirators named herein, together with other persons, partnerships, corporations and companies unknown to plaintiff, have acted concertedly together through agreement, understanding and control, and in certain cases tacitly, and pursuant thereto have mutually adopted and conducted their businesses in accordance with common plans and programs, which defendants and some or each or all co-conspirators have adopted in order to accomplish the following purposes and objectives, among others:

(a) Control, eliminate, restrain and regulate the degree of competition and to restrain trade in the lumber and timber industry;

(b) Monopolize, control and channelize distribution of lumber and timber products;

(c) To arbitrarily, unlawfully, unreasonably and knowingly raise, fix, control, set, stabilize and effect the price of timber and lumber products purchased and shipped in interstate commerce within the United States;

(d) To arbitrarily, unlawfully, unreasonably and knowingly prevent, suppress and eliminate competition with other potential and actual competitors in the sale and procurement of lumber and timber products; and

(e) To establish and maintain unreasonably high, excessive, monopolistic and noncompetitive prices for lumber and timber products and thus deprive purchasers and consumers of the benefits of free and open competition.

IX.

Activities in Furtherance of Such Plans

To further the objective of said conspiracy, defendants, Great Northern and Western Pacific and other co-conspirators, among other activities, have:

(a) Systematically attempted to preclude plaintiff and plaintiff's assignor, from operating lumber mills in the vicinity of Klamath Falls, Oregon, and from obtaining the requisite supply of logs and timber in order to operate such mills;

(b) Prevented and restrained plaintiff and plaintiff's assignor from marketing their products except in certain designated and prescribed areas;

(c) Held back large sums of money for extended periods of time, which greatly inhibited and prevented plaintiff and plaintiff's assignor, from competing on an equal basis;

(d) Fixed rates arbitrarily and unfairly against plaintiff and plaintiff's assignor, which made it difficult to compete; and charging and establishing unfair

disproportionate rates to plaintiff and plaintiff's assignor;

(e) Refusing to extend the same facilities on an equal basis to plaintiff and plaintiff's assignor, which are extended to its business rival or rivals; and

(f) Forcing plaintiff and plaintiff's assignor to abandon many facilities, because of the economic pressure exerted by the actions described above.

X.

Effect of the Restraints

The effect of the aforesaid restraints and attempts to monopolize has been to restrain trade and commerce among the several states, and constitutes an attempt to monopolize a part of the trade or commerce among the several states, in violation of the Sherman Act (15 U.S.C. #1 and 2) and subsequent amendments.

XI.

Result of Defendants' Unlawful Acts

As a direct result of defendants' actions, plaintiff and plaintiff's assignor businesses have been greatly hampered, have been precluded from their normal growth, have been restricted from obtaining supplies and raw materials, have lost the interest on the money which was withheld, have been required to operate with impaired capital, have been obliged to abandon facilities, have sustained losses in the value of property and equipment and have been obliged to sell property and equipment at depressed prices, all to their damage in the sum of $3,875,000.

XII.

Treble Damages

Plaintiff and plaintiff's assignor have been damaged in their business and property by reason of the unlawful

conduct and acts of the defendants, and under the provisions of an Act of Congress of the United States, approved October 15, 1914, 38 Stat. 731 (U.S.C. Title 15, #15), plaintiff is entitled to recovery in the amount of threefold damages sustained by plaintiff and plaintiff's assignor and the costs of this action and for reasonable attorneys' fees incurred herein.

WHEREFORE, plaintiff requests compensation for damage sustained by itself and by its assignor in the sum of $3,875,000, which sum should be trebled in the manner provided by law, and for its reasonable attorneys' fees, and for its costs and disbursements incurred herein.

/s/ Roger Tilbury
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Plaintiff respectfully requests a trial by Jury.